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No. 07-881

IN THE SUPREME COURT
OF THE UNITED STATES

LESLIE ANN MELTON
f/k/a LESLIE ANN FREDMAN,
Petitioner,

and

DAVID LYNN FREDMAN,
Respondent.
/

PETITION FOR WRIT OF CERTIORARI

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of Florida, Second District

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QUESTIONS PRESENTED

1. **Absent demonstrated harm to the child, is the "best interest of the child" sufficient to serve as a compelling state interest to deprive a parent of his/her constitutional rights?**
2. **What is the proper legal standard to be applied when a court must determine if a child should be permitted to relocate to another state with their already established primary caregiver -- "best interest of the child" or "detriment to the child"?**
3. **Is it an abuse of a state's parens patriae power to restrict a parent from establishing their home for their child(ren) in another state when that parent has previously been awarded primary residential custody, either by court order or agreement, and has not subsequently been found to be unfit to retain their primary custodial status?**
4. **Is it a violation of a primary custodial parent's constitutionally protected rights to geographically restrict where he/she may establish their home, by court order, based solely on their custodial status?**

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007).

JURISDICTION

The date on which the highest state court decided this case was June 20, 2007. A timely petition for discretionary review by the Supreme Court of the State of Florida was thereafter denied on October 8, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). Further, 28 U. S. C. § 2403(b) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this case is whether the "best interest of the child" legal standard, absent demonstrated harm, is sufficient to serve as a compelling state interest to deprive a parent of his/her constitutional rights under a state's parens patriae power.

U.S. Const. Amend. XIV, § 1;

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Const. Art. I, § 23;

Right of privacy.— Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.

Fla. Stat. § 61.13(2)(b)(2), (2007)

The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared

parental responsibility would be detrimental to the child.

Fla. Stat. § 61.13(2)(d), (2004)

See Appendix E.

Fla. Stat. § 61.13001(7) & (8), (2006)

See Appendix F.

STATEMENT OF THE CASE

The parties in this case divorced on October 14, 2002, with the Final Judgment of Dissolution of Marriage ("Final Judgment") incorporating the July 2002 Marital Settlement Agreement ("MSA") that was entered into voluntarily by both parties. In the MSA, the parties agreed that Petitioner would be the primary residential parent of their two children (Joshua, date of birth 12-21-94, and Jared, date of birth 12-22-97). There was no provision restricting the Petitioner's relocation with the children.

On January 23, 2004, Petitioner petitioned the court to modify the Respondent's visitation to accommodate the children's relocation with her to Texas due to her upcoming marriage to Mr. Melton. Respondent objected to the relocation but did not seek primary custody of the children. Petitioner married Mr. Melton on March 25, 2004, but a temporary injunction prohibited her and the children's relocation. On December 9, 2004 the trial court entered an order denying Petitioner's relocation request, and she appealed that order. On January 27, 2006 the District Court of Appeal of the State of Florida, Second District issued Fredman v. Fredman, 917 So. 2d 1038 (Fla. 2d DCA 2006), reversing the court's ruling, finding that the trial court had "applied the wrong standard in measuring the substitute visitation schedule." Id. at 1041. On remand, the trial court was instructed to use the correct legal standard of

whether the substitute visitation was adequate to maintain a continuing meaningful relationship between the Father and children if they were allowed to relocate with their Mother. Id.

On March 23, 2006, the trial court on remand once again denied Petitioner's relocation request, finding that: (1) the substitute visitation would be adequate to foster a continuing, meaningful relationship between the children and the Father, (2) there was no evidence to suggest that Petitioner would not comply with any substitute visitation arrangements, (3) the move would be likely to improve the quality of life of Petitioner and her new husband, (4) the children's lives would be "substantially the same" in Texas as it is in Florida, (5) the Father had not petitioned the court for a change in custody, but (6) there had not been an adequate showing that the proposed relocation would improve the children's school, family or even home life, and (7) the relocation was not in the children's best interest. Petitioner once again appealed. On June 20, 2007, the District Court of Appeal of the State of Florida, Second District issued Fredman v. Fredman, 960 So. 2D 52 (Fla. 2D DCA 2007) affirming the trial court's ruling on remand. (See Petitioner's Appendix A.) Petitioner subsequently appealed to the Supreme Court of the State of Florida, and discretionary review was denied on October 8, 2007.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The District Court Of Appeal Of The State Of Florida, Second District, In Fredman V. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) Conflicts With The Decisions Of other state supreme courts of the United States On The Same Important Matter.

The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2D 52 (Fla. 2D DCA 2007) expressly and directly conflicts with other state supreme courts of the United States who have recently addressed the sensitive and constitutionally charged issue of parental relocation. The issue of parental relocation and the vast difference in how this issue is currently being addressed by the State of Florida as compared to other states is a matter of great public importance that demands this honorable Court's attention and guidance. A lack of clear and constitutionally sound guidance as to how much control a State can exert over a primary residential parent when they seek to relocate the primary residence of a minor child has resulted in inconsistent and often unconstitutional results among courts of last resort throughout the United States.

The Florida Supreme Court has not addressed the issue of parental relocation since Mize v. Mize, 621 So. 2d 417 (Fla. 1993) and Russenberger v. Russenberger, 669 So. 2d 1044 (Fla. 1996), when the Court established a

rebuttable presumption favoring good faith relocation requests. In 1997, the Florida Legislature enacted Fla. Stat. § 61.13(2)(d)[1] eliminating the Florida Supreme Court's previously proclaimed presumption in favor of good faith relocation requests. The enactment of this legislation ultimately shifted the burden from the secondary residential parent - who had to prove under Mize and Russenberger that the requested relocation was being made in bad faith - to the primary residential parent who now had to prove: 1) the request was made in good faith; 2) the move will be likely to improve the general quality of life for both the residential parent and the child; 3) that they will comply with any substitute visitation arrangements; 4) that substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent; 5) that the transportation for visitation is financially affordable; and 6) that the move is in the child's best interest. This heavy burden is virtually impossible to carry, because even a primary

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[1] On October 1, 2006, Fla. Stat. § 61.13001 entitled "Parental relocation with a child" became effective. While this new relocation statute contains a more balanced approach at analyzing relocation requests, it still suffers from the same unconstitutional infirmities once the secondary residential parent properly objects to a relocation request. Section 61.13001(7), Fla. Stat. (2006) continues to give the trial court the unbridled discretion to deny a primary residential parent's relocation request because the court believes it is not in the child's best interest, without requiring a showing of ill motive or harm.

residential parent who is doing a good job in parenting his/her children (good housing, good school, good behavior, good contact with secondary residential parent) has little chance of proving all of these factors, resulting in primary residential parents in Florida being restricted to living in the secondary residential parent's home town during their children's majority.

In Fredman v. Fredman, 960 So. 2D 52 (Fla. 2D DCA 2007), the District Court of Appeal of the State of Florida, Second District affirmed the trial court's denial of the Mother's relocation based exclusively on the fact that the trial court simply did not agree that the children's relocation to Texas was in their best interest. The trial court had found no evidence to suggest that the relocation of the children to Texas would be detrimental to them. The trial court had found no evidence to suggest that the Mother was relocating to Texas out of a vindictive desire to interfere with the Father's visitation with the children. The court had found no evidence that the Mother was unfit to retain primary residential custody. The trial court specifically found that the Mother would comply with any alternate court ordered visitation arrangement, and the Father had not petitioned the court for primary custody of the children. The trial court in Fredman denied the Mother's request to relocate the children based solely on its personal opinion of "best interest", and the Second District affirmed the trial court's denial, ultimately leaving the Mother in "legal limbo" with regard to her

primary residential custody. This decision not only conflicts with the Florida Supreme Court's last published opinion on parental relocation matters, but also conflicts with many other state supreme courts across this nation.

In 2005, the Supreme Court of the State of Colorado reversed the denial of a relocation request by a primary custodial parent who sought to relocate with her son to Arizona for employment reasons. See In re: Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005). In Ciesluk, the Colorado Supreme Court held that in the absence of demonstrated harm to the child, the "best interests of the child" was insufficient to serve as a compelling state interest, depriving a parent of his/her constitutional right to travel. The decision of the district court in Fredman conflicts with the Colorado Supreme Court's holding in Ciesluk, because the Fredman court affirmed the trial court's denial of the Petitioner's relocation request based solely on best interest, without finding any demonstrated harm to the children, whereas the Colorado Supreme Court in Ciesluk believed that the best interests of the child was not sufficient to serve as a compelling state interest unless there was a showing of harm.

In Mahmoodjanloo v. Mahmoodjanloo, 160 P.3d 951 (Okla. 2007) the Oklahoma Supreme Court recently reversed a Father's denied relocation request where the Father who had primary custody of his two daughters was seeking to move to live with his spouse in New York. The Oklahoma Supreme Court

found that the Father had a good-faith reason for the proposed move (i.e., to join his spouse in another state) and was not moving from a vindictive desire to interfere with the Mother's visitation. Justice J. Opala of the Mahmoodjanloo court also noted that denying a relocation request without conducting a post-denial proceeding to adjudicate the legal consequences that flowed from its decision cast an impermissible burden on the father's previously adjudicated custodial interest. The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2D 52 (Fla. 2D DCA 2007) conflicts with the Mahmoodjanloo court in this regard, as the Second District affirmed a trial court's order that casts an impermissible burden on the Petitioner. The State of Florida has implicitly left the Petitioner with the burden of choosing between primary residential custody of her children in Florida or her new marriage in Texas. Forcing a remarried parent to voluntarily give up primary residential custody of their children in order to exercise constitutionally protected rights, for no other reason than the court disagrees with the primary residential parent's residential choice, is clearly an impermissible burden to that parent that demands strict scrutiny by the judiciary. Yet, Florida's Second District Court of Appeal has failed to acknowledge that this impermissible burden exists.

The Supreme Court of the State of North Dakota also recently reversed a primary

custodial Mother's denied request to relocate to West Virginia to be with her new husband in Gilbert v. Gilbert, 730 N.W.2d 833 (N.D. 2007). The Gilbert court held that the trial court had erred by focusing on the lack of evidence supporting economic benefits of the proposed relocation, where the Mother was not seeking to relocate for economic reasons; she wanted to move to be with her new husband. The Gilbert court held that while North Dakota has no statutory presumption in favor of or against a request to relocate and that no one factor is dominant in evaluating whether a move to another state is in the child's best interest, when the custodial parent desires to move to live with a new spouse, that fact becomes dominant in favor of allowing the child to move to another state, particularly when there is no evidence of ill motive or that the visitation with the non-custodial parent is not likely to occur. Upon reversal the Gilbert court specifically noted that at that time they had found no cases where a custodial parent's request to move out of state to live with a new spouse was denied when the integrity of the custodial parent's motive for moving was not questioned. Like North Dakota, Florida's parental relocation statute has no statutory presumption in favor of or against a request to relocate. However, in direct conflict with North Dakota's holding under nearly identical circumstances, the court in Fredman did not find the Mother's request to relocate to Texas to live with her new spouse to be a weighing factor at all.

In MacKinnon v. MacKinnon, 922 A.2d 1252 (NJ 2007), the Supreme Court of the State of New Jersey also recently affirmed a Mother's relocation with her 7-year old daughter to Okinawa, Japan to be closer to family, decrease living expenses, and to pursue improved job opportunities. The MacKinnon court found that the Mother had a good-faith reason for the move, and that the move would not be inimical to the child's best interests. Thus, the State of New Jersey had no compelling reason to restrict the child from relocating with her primary caregiver to Japan. In sharp contrast, the Fredman court found no compelling reason to restrict the children from relocating with their primary caregiver to Texas, and denied the Mother's request based solely on the trial court's personal opinion of best interest.

The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) clearly conflicts with recent decisions of other state supreme courts of the United States as to how much control a State can constitutionally exert over a primary residential parent when they seek to relocate the primary residence of a minor child. Accordingly, this Honorable Court should grant this Petition for Writ of Certiorari in order to resolve conflict that directly affects the constitutional rights of primary residential parents and to establish uniformity in parental relocation laws among the United States.

II. Florida's Parental Relocation Statute, Fla. Stat. § 61.13(2)(D), Is Unconstitutional.

The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) affirming the trial court's application of Fla. Stat. § 61.13(2)(d)sets legal precedent in the State of Florida that blatantly violates the constitutional rights of all primary residential parents. Under the 14th Amendment of the Federal Constitution, a citizen can seek redress and protection for any state legislation that brings them an injury by depriving them of a civil right. Rights and privileges are secured by the fourteenth amendment by way of prohibition against state laws and state proceedings that negatively affect those rights and privileges. This Court has previously stressed the importance of the Constitutional protections afforded the institution of family in our Nation's history and tradition.

> **"[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition".**

Moore v. East Cleveland, 431 U.S. 494, 503 (1977). This Court has also stressed that "'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation [of fundamental rights].'" (Emphasis added.) Sherbert v. Verner,

374 U.S. 398, 406 (1963) (emphasis added)(quoting Thomas v. Collins, 323 U.S. 516, 530 (1945).

The decision of the District Court of Appeal of the State of Florida, Second District, in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) is at odds with this Court's general policy governing decisions on family matters. The district court's decision to affirm the trial court's order prohibiting Petitioner's relocation with her children to Texas to live with her husband and stepson unavoidably creates a court ordered division of two children's primary residential family unit -- without cause -- and renders the Petitioner and the children prisoners of the State of Florida. This decision not only infringes on many of the Petitioner's constitutionally protected freedoms, but also provokes the destruction of the children's primary residential family by forcing the Petitioner to live separately from her spouse and new family, else abandon the children of whom she has previously been awarded primary residential custody. See Zablocki v. Redhail, 434 U.S. 374, 396 (1978) Powell, J. concurring) (The right of the State to regulate the institution of marriage under its police power is unquestioned where it does not infringe on fundamental rights.)

A. Florida's Parental Relocation Statute is Unconstitutional Because it Violates Primary Residential Parents' Right to Privacy.

Florida's parental relocation statute

violates primary residential parents' right to privacy, because the statute gives Florida courts the authority to scrutinize and override a primary residential parent's decision regarding where best to geographically establish their personal family home on a showing of significantly less evidence than that the child would be harmed by their decision or that their motive for relocating is questionable. In 1980, Florida amended its Constitution to secure an independent, freestanding Right to Privacy Clause which states that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life." Florida Const. Art. I, § 23. The Florida Supreme Court has since held that,

> **"...[r]ight of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means."**

Winfield v. Division of Para-Mutual Wagering, 477 So.2d 544, 548 (Fla.1985). See also In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989). A primary residential parent's fundamental interest in establishing a suitable family home

for their child and raising their child in that home while the child is under their care and control without governmental intrusion is thoroughly undermined by Florida's Relocation Statute.

The Second District held in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) that a primary residential parent's right to privacy is not implicated by Florida's Relocation Statute, because when the parents agree to shared parental responsibility and a court order provides for shared parental responsibility, the primary custodial parent (the Petitioner in this case) does not have a reasonable expectation of privacy to decide in what state the children live, with respect to the secondary custodial parent (the Respondant), although she would have a reasonable expectation of privacy as to a third party. (Appendix A, p. 9) Essentially, the Second District's opinion in Fredman denounces the Petitioner's right to privacy in deciding where the parties' children live while they are under her care, and upholds the Father's right to privacy in deciding where the children live while they are under his care. The constitutional infirmity of Florida's Relocation Statute asserted by the Petitioner is that the statute violates primary residential parents' right to privacy by forcing them to subject their personal decision of where to establish their home to judicial scrutiny and empowers the state to dictate where the primary residential parent may/may not live without requiring a determination by the court that the

primary residential parent is no longer fit to make primary residential decisions for their children.

This Court has ruled that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." Troxel v. Granville, 530 U.S. 57 (2000). The primary residential parent has previously been selected as the better parent to handle the day-to-day care of the child, either by agreement or court order, and is in the best position to make the determination of where they can best facilitate their day-to-day care of that child. As stated in Troxel,

> **"[T]here is a presumption that fit parents act in the best interest of the children....Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Id at 530 U.S. at 68-69.**

The provision in Florida's Relocation Statue that directs the court that "[n]o presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move

will materially affect the current schedule of contact and access with the second residential parent", eliminates any presumption that the child's primary guardian has the best interest of their child at heart. Thus, the Petitioner argues that in the absence of requiring substantial proof that the primary residential parent is no longer fit to make primary residential decisions in the best interest of their child, or that the child will suffer a sufficient degree of harm or detriment to their rights or welfare if allowed to relocate with their primary care giver, Florida's Relocation Statute in facially unconstitutional.

B. Florida's Parental Relocation Statute is Unconstitutional Because It Violates Primary Residential Parents' Right to Travel.

Restraint upon a person's "right of travel" was a well-known feature of slavery abolished by the Thirteenth Amendment. In Jones v. Helms, 452 U.S. 412, 417-18 (1981), this Honorable Court acknowledged the right of United States citizens to travel, stating, "It is, of course, well settled that the right of a United States citizen to travel from one State to another and to take up residence in the State of his choice is protected by the Federal Constitution.". See also Shapiro v. Thompson, 394 U.S. 618 (1969) (...our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which

unreasonably burden or restrict this movement.)[Emphasis Added.]

The Second District Court of Appeal's opinion in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) is that the Petitioner's right to travel has not been implicated, because she is not personally prevented from relocating to another state, but is only restricted from relocating to another state with the parties' children. (Appendix A, p. 10.) This opinion is not logical and avoids the very crux of the constitutional violation asserted by the Petitioner. The Petitioner, the Mother, is not free to relocate without her children while she has previously adjudicated primary physical custody of the children who are restricted from moving with her, and no alternate custodial arrangement has been determined to be more in the children's best interest than relocating with her. Thus, Florida's courts have left the Mother in "legal limbo", resulting in the violation of her constitutional right to travel.

Florida's Relocation Statute is clearly at fault, because the statute does not require the opposing parent to present and prove to the court that an alternate parenting plan is more in the best interest of the child than relocating with their already established primary residential parent when they object to the primary residential parent's relocation. Thus, by implication, any denied relocation request under Florida's relocation statute requires a parent to give up the primary custody and responsibility of their child in order to exercise

their constitutionally protected right to travel. This is clearly a penalty to that parent that demands strict scrutiny by the judiciary. In Mahmoodjanloo v. Mahmoodjanloo, 160 P.3d 951 (Okla. 2007), Opala, J., dissenting, the Oklahoma Supreme Court recognized that attempting to dispose of a relocation issue without conducting a post-denial proceeding to adjudicate the legal consequences that flow from its decision casts an impermissible burden on the primary custodial parent's adjudicated custodial interest. See Dunn v. Blumstein, 405 U.S. 330, 339 (1972)("....since the right to travel was a constitutionally protected right, 'any classification which serves to penalize the exercise of that right unless shown to be necessary to promote a compelling governmental interest, is unconstitutional'"); Jaramillo v. Jaramillo, 823 P.2d 299, 306 (N.M. 1991)(citing Shapiro v. Thompson, 394 U.S. at 631). ("[I]t makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether."); In re Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005) ("..though [section 14-10-129] does not prohibit outright a majority time parent from relocating, it chills the exercise of that parent's right to travel because, in seeking to relocate, that parent risks losing majority parent status with respect to the minor child."). Thus Florida's Relocation Statute is facially unconstitutional, because it

does not require a trial court to resolve the legal consequences that result from a denied relocation request.

C. Florida's Parental Relocation Statute is Unconstitutional Because It Violates the Equal Protection Clause of the Fourteenth Amendment of the United States' Constitution.

Florida's Relocation Statute violates the right to equal protection under the law guaranteed by the Fourteenth Amendment of the U.S. Constitution by creating a suspect class...primary residential parents...and discriminating against them by elevating the secondary residential parent's schedule of parenting time with their child above the primary residential parent's right to a presumption that they are acting in their child's best interest. The Second District Court of Appeal's opinion in Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) is that this argument is without merit, because primary and secondary residential parents are not "similarly situated". (Appendix A, p. 16.) Interestingly, the Second District also believes the secondary residential parent, although not "similarly situated" as to the primary residential parent, has an equal right in determining where the children's primary residence should be, pursuant to the shared parental responsibility provision of their final judgment and marital settlement agreement. (Appendix A, p. 9.) The Second District's construction of Fla. Stat. § 61.13(2)(b)(2)(2007)

regarding shared parental responsibility and Fla. Stat. § 61.13(2)(d)(2004) regarding parental relocation effectively permits the statutes to operate as a sword and a shield for secondary residential parents. According to the District Court of Appeal of the State of Florida, Second District, a primary residential parent has no rights whatsoever in deciding where their children's primary residence will be...despite being given the court ordered title of "primary residential parent"...whereas, the secondary residential parent retains full, unscrutinized legal right to decide where their children's secondary residence will be pursuant to their court ordered title of "secondary residential parent". It cannot be both ways! Either both parent's rights and responsibilities to their children are equal and should be equally protected by the law, OR the parent's rights and responsibilities are not equal and the "primary residential" designation carries with it some measure of deference. By definition, the word "primary" means first in rank, importance, or value. One of the most significant elements of stability in a child's life is their primary caretaker--the person who cooks their meals, puts them to bed, cares for them on a daily basis, and has dedicated his/her daily life to raising them. See Kaiser v. Kaiser 23 P.3d 278, 35 (Okla. 2001);

> **"[T]he well-being of the child is fundamentally interrelated with the well-being of the custodial parent, and that parent is the best person to make decisions affecting**

> **the child and the new family group, such as where they will reside."**

See also D'Onofrio v. D'Onofrio, 365 A.2d 27, 29 (N.J. Super 1986),

> **"The custodial parent, who bears the essential burden and responsibility for the children, is clearly entitled to the same option to seek a better life for herself and the children, particularly where the exercise of that option appears to be truly advantageous to their interests and provided that the paternal interest can continue to be accommodated, even if by a different visitation arrangement than theretofore."**

However, Florida's Relocation Statute elevates the secondary residential parent's rights above the primary residential parent's rights and gives absolutely no weight to the "primary" designation and the daily responsibility that designation carries with it. This is the constitutional violation asserted by the Petitioner.

Further, the Petitioner argues that the court's authority in parental relocation matters lies only in Florida's statutory policy to assure that "each minor child has frequent and continuing contact with both parents after the marriage of the parties is dissolved", Fla. Stat. § 61.13(2)(b)(1) (2007), and that the state's interference in family matters is only constitutionally justified in protecting the best

interests of children in this regard. In *In re* Marriage of Pape, 989 P.2d 1120, 1128 (Wash.2000), the Washington Supreme Court explained:

> **"We are aware of and are sympathetic to the difficulties faced by parents whose children move, with the other parent, some distance away. However, these difficulties are a consequence of the dissolution of marriage. Once the decree of dissolution is entered, a trial court's involvement in decision-making for the family is minimized. The court's role in a family's life following dissolution of marriage is not to review every parenting decision to determine if it is in the child's "best" interests. Once the court has determined the best residential placement of the child, based on the best interests standard set forth in the statute, the important job of the court is finished. The court does not again become significantly involved in parenting decisions, unless the child's well-being is seriously threatened by parenting decisions. A change in the location of the child's place of residence, with the primary residential parent, generally does not pose such a serious threat."**

Also speaking to the necessity of judicial deference on decisions by the custodial parent as to their place of residence, the Supreme Court of Vermont stated in Lane v. Shenck, 614 A2d 786, 789 (Vt. 1992):

> **"At the time of divorce, mother was given the powers [of custody] which included the right to decide where she would reside with the children. The place of residence for a family is central to childrearing, and thus that decision is understandably entrusted to the parent awarded parental rights and responsibilities. Mother's decision as to place of residence was overruled because the court's judgment on that issue was entitled, under its view of the law, to more weight than hers. Mere disagreement, however, is not enough... The court may differ with the custodian as to the wisdom of a certain parental decision, but it may not lightly replace the judgment of the custodian with its own."**

In contrast, the Second District's opinion is that the sole purpose of Florida's Relocation Statute is to preserve the non-custodial parent's rights, rather than to preserve the rights of the children with regard to that parent. (Appendix A, p. 16.). See Planned Parenthood of Southeastern Pa. V. Casey, 505

U.S. 833, 847 (1992) (The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.) It is the Second District's statutory construction of Florida's Relocation Statute that creates the equal protection violation, where the secondary custodial parent's rights are elevated above the primary custodial parent's rights. This construction of Florida's Relocation Statute does not further the state's goal of assuring that children have frequent and continuing contact with both parents after their parents divorce by the statutory intrusion of only the primary residential parent's protected fundamental rights when the secondary residential parent maintains absolute freedom to move away from their children, regardless of the impact their choice may have on their children. Thus, Florida's Relocation Statute is facially unconstitutional.

CONCLUSION

This Honorable Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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12/21/07

Date